No. 221.

Brief of Vale for D. & I. R. R. Co.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 26, 1899.

DULUTH AND IRON RANGE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JOSEPH ROY,
DEFENDANT IN ERROR.

No. 221.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

J. M. VALE,
Attorney for Defendant in Error.

JOHN BRENNAN,
Of Counsel.

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I.

Privity between the plaintiff and the United States sufficient to sustain this suit is found in the laws enacted by Congress governing the disposition of the public domain and in compliance or tender of compliance with such laws on the part of defendant in error as far as was in his power through the wrongful act of the land officers. The acts of the defendant in error are fully set out in the

Findings of Fact. These facts are that on the 26th day of May, A. D. 1883, defendant in error, then being duly qualified to enter Government lands under the homestead laws, made *bona fide* settlement upon the lands involved in this suit, and on that date established his *bona fide* residence upon said land, and has ever since continued to reside thereon, and has maintained from the date of his settlement the actual, exclusive, and notorious possession thereof, and that during all of which time he has cultivated and improved the same and maintained his home upon said premises (Findings 1, 2, and 3); that he did not file upon the land at the date of his settlement because the township plat had not then been filed in the local land office; that on July 2, 1883, the township plat having been filed, the defendant in error went to the local land office with the intention of entering the land upon which he had made settlement as a homestead, and then and there requested the officers of said land office to allow his entry, but he was told a mistake had been made in the survey of the land, and that in all probability a resurvey thereof would be ordered; that it was unnecessary for him to protest or object to said survey or to file on said land, and thereupon the local officers advised him to wait until pending protests against the survey which were there on file should be determined (Findings 4 and 5); that defendant in error relied upon the representations so made to him by said officers (Finding 6); that on the 5th of August, 1884, he discovered that the land was claimed by the State of Minnesota, and on that date he made application to enter the land as a homestead under the laws of the United States, and tendered the local land officers the fees for making such entry; that then no adverse claim, other than the pretended claim of the State of Minnesota to said land as swamp

land, had arisen (Finding 7); that the local officers rejected his application to enter said land on the ground that the land inured to the State of Minnesota under the act of March 12, 1860, and that his application to enter said lands was not made within three months after the filing of the township plat in the local office (Finding 8). On the 9th of Augus', 1884, defendant in error filed his contest against the claim of the State of Minnesota in due form, and on the 26th of August, 1884, he appealed from the decision of the local officers rejecting his homestead application unto the Commissioner of the General Land Office, and his appeal was duly transmitted to the Commissioner of the General Land Office, August 26, 1884, and was by that office received and filed on or about September 1, 1884 (Findings 9 and 10); that while his appeal was pending and undetermined patent was, on the 23d day of January, 1885, issued to the State of Minnesota, through mistake and inadvertence (Finding 11); that he has improved the land during his residence, by the erection of a good and substantial dwelling-house, which was replaced by a second dwelling when the first was destroyed by fire, and that he has cleared and cultivated the land to crops from year to year (Findings 12 and 13).

Defendant in error performed the acts of settlement and residence required by the homestead laws; he was prevented from performing the acts of entry and final proof by the action of the officers of the Land Department. When the United States determined to give the land away, privity between the defendant in error and the United States arose when the defendant in error made his *bona fide* settlement thereon.

Ard *v.* Brandon, 156 U. S. 537.

Privity between the defendant in error and the United States does not rest upon a recognition by the officers of the Land Department of an asserted claim on the part of the defendant in error. The question of privity is determined by the laws enacted by Congress governing the disposition of the public domain, and in case of a homestead settler it exists when the law has been complied with or compliance has been tendered by a qualified settler in so far as the same is in his power.

II.

Answering the contention that the issuance of the patent to the State of Minnesota was an adjudication of the fact that the land is swamp land, if it be conceded that the patent was issued under the swamp-land laws, it is contended that the findings show distinctly that the appeal raising that very question by the defendant in error was never finally passed upon by the Land Department, and it nowhere appears that the patent was issued upon the determination that the land was swamp or overflowed land. But the findings show that as a matter of fact the land has never been swamp or overflowed land. It is not to be presumed that the officers of the Land Department decided the reverse to be the case when the contrary showing of defendant in error was then pending in the office of the Commissioner of the General Land Office, and no action thereon was had.

But it is not admitted that if the officers of the Land Department had decided this land to be swamp land, when in fact it was nothing of the kind and never had been, a court of equity is powerless to correct that mistake. This court has said in Johnson *v.* Towsley, cited *infra*, that: "It is fully conceded that when those officers decide

controverted questions of fact, in the absence of fraud or imposition or mistake their decision is final, except as they may be reversed on appeal in that Department." But if the officers of the Land Department held the land to be swamp land that was not the decision of a *controverted* question. There was no decision upon that question raised by defendant in error by his appeal which was pending when the patent was issued. If the question whether the land was swamp land was ever decided by the officers of the Land Department, it was decided *ex parte*, and does not fall under the above rule. The decision that the land was swamp land, if made, would fall within the further rule announced in the cited opinion: "But we are not prepared to concede that when in the application of facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of these laws, the courts are without power to give any relief."

After referring to the powers exercised by this court in reviewing the acts of the officers of the Land Department in refusing to interfere with the action of that Department so long as title remained in the Government, the court says, in the same opinion: "On the other hand, it has constantly asserted the right of the proper courts in inquiring, after the title has passed from the Government and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own or as trustee for another."

The contention of plaintiff in error cannot be correct that the officers of the Land Department have power to say that high and dry land is swamp land, and that the power exists in them, without authority of inquiry

by the courts, to dispose of high and dry land as swamp land in the presence of an entirely different intent on the part of Congress and to the impairment of the rights of *bona fide* settlers.

The rights of the defendant in error have never been finally passed upon by the officers of the Land Department; while seeking a determination of his rights that avenue was closed to him by the issuance of a patent.

The defendant in error having acquired a right under the law by his act of *bona fide* settlement, it was not in the power of the officers of the Land Department to take away that right by issuing a patent to the State of Minnesota.

III.

Throughout the proceedings it has been accepted as a fact that the land was patented to the State of Minnesota under the swamp-land laws. But the question at issue is the superior right of the defendant in error over any right of the patentee or those claiming under the patent. That superior right is shown by the facts as found. Wherefore the particular law under which the patent was mistakenly issued is not a material fact.

IV.

The mistake and inadvertence found and which actually exists is that of issuing a patent under any law or without law to the State of Minnesota in the presence of the superior right of defendant in error, acquired as set forth in the Findings of Fact; and that is the mistake and inadvertence corrected by the judgment of the court below.

V.

The remedy sought to be enforced in this action has been held by this court in numerous cases to be the proper one, ~~but~~ upon such an issue as that existing between the parties to this suit. The question involved is whether the case discloses equitable rights in the defendant in error superior to the claim of the plaintiff in error.

Silver *v.* Ladd, 74 U. S. 219.

Johnson *v.* Towsley, 80 U. S. 72.

In the opinion of this court in the latter case, announced by Justice Miller, the court said:

"And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, 'a court of equity will,' in the language of this court in the case of Starks *v.* Starrs, just cited, 'convert him into a trustee of the true owner and compel him to convey the legal title.'"

Defendants in error cite in support of their contentions herein:

Brainard *v.* Ashley, 18 Howard, 43.

State of Minnesota *v.* Batcheller, 1 Wall. 115.

Shepley *v.* Cowan, 91 U. S. 330.

Sampson *v.* Smiley, 80 U. S. 91.

Morris *v.* Stackmaker, 104 U. S. 212.

Linley *v.* Hawes, 67 U. S. 265.

Cunningham *v.* Ashley Heirs, 14 Howard, 377.

Williams *v.* U. S., 138 U. S. 514.

Moore *v.* Robins, 96 U. S. 535.
Lyttle *v.* Arkansas, 9 How. U. S. 334.
Landdsale *v.* Daniels, 100 U. S. 113.

Respectfully submitted.

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JOHN BRENNAN,
of Counsel.

Supplement to Brief of Defendant in Error.

Upon the first contention of plaintiff in error it is further submitted that no right attached to the State of Minnesota merely by reason of the force and effect of the acts of March 12, 1860, and September 30, 1850, because the lands are not nor never have been swamp or overflowed lands. (14th Finding.) The sole right of the State is the legal title acquired at the date of and under the patent to the State of January 23, 1885. (11th Finding.) The right of defendant in error attached at the date of his settlement, May 26, 1883. (2nd Finding.) At that date no other claim attached to the land. (7th Finding.) Privity between the United States and the defendant in error is an incident to his act of settlement under the homestead laws, and that privity has been maintained by his continued residence upon and improvement and cultivation of the land.

It was not incumbent upon the defendant in error to perform the vain act of offering final proof, because long before his final proof was due the land had been patented to the State of Minnesota, and all control over the title to the land by the Executive Department of the Government had ceased.

Moore *v.* Robbins, *supra.*
Sampson *v.* Smiley, *supra.*
Linley *v.* Haines, *supra.*
Cunningham *v.* Ashley Heirs, *supra.*
Ard *v.* Brandon, *supra.*
Hughes *v.* United States, 4 Wall. 232.
Quinn *v.* Chapman, 111 U. S. 445.
St. Louis Smelting Company *v.* Kemp, 104 U. S. 636.
U. S. *v.* Marshall Silver Mining Co., 129 U. S. 579.
Bisson *v.* Curry, 35 Iowa, 72.
Gilman *v.* Lapp, 100 Ill. 297.
Webber *v.* Pere Marquette Broom Co., 62 Mich. 626.

In Ard *v.* Brandon, *supra*, it was held that when a preemptor has the right to make entry and applies to the local officers and they refuse to recognize his application, his right will be deemed to date from the time of his application, and this, notwithstanding he proceeds to obtain title in some other way.

His application relates back to his date of settlement.

Roy's right by settlement attached prior to the filing of the plat of the survey, and consequently prior to any right of record which has ever attached to the land, because the land had been erroneously (or fraudulently) reported as swamp and overflowed land. Such survey could in no way affect the status of the land in its physical condition: that is, the mere act of survey could not make that swamp which nature had made high and dry.

But the plat of survey was filed in June, 1883: Roy settled in May, 1883. Finding 4 discloses that at the date of Roy's settlement the plat had not been filed in the local land office.

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